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CABINET

WAR CRIMES: CASE OF GERMAN GENERALS IN BRITISH CUSTODY

MEMORANDUM BY THE SECRETARY OF STATE FOR WAR

1. At a recent meeting of the Overseas Reconstruction Committee I was asked to submit, for decision of the Cabinet, the question whether certain senior German generals, at present detained under British control in this country, should be brought to trial. They are Field Marshals von Brauchitsch, von Rundstedt and von Manstein, and Colonel General Strauss. Strauss has been in our custody since May, 1945, and others since July and August, 1945.

2. The question was first raised by the United States authorities in September, 1947. After the trial of the major war criminals at Nuremberg the United States authorities set up an Executive for the purpose of bringing to trial certain groups of war criminals (doctors, industrialists, etc.) and during the screening activities of this Executive a great many captured documents were considered. Among these was a large body of documents indicating responsibility of these generals for war crimes, crimes against humanity and crimes against peace. The Chief of the Executive, in forwarding a memorandum with photostat copies of many of these documents to the Attorney-General, drew attention to the passage in the Nuremberg Judgment relating to the German General Staff which ends:— "Where the facts warrant it, these men should be brought to trial so that those among them who are guilty of these crimes should not escape punishment".

3. The memorandum which is voluminous, discloses a *prima facie* case for various crimes, in particular the following:—

(*a*) Against all four generals, in connection with the "Commissar" Order, under which political commissars of the Russian Army were not to be recognized as prisoners of war and were to be liquidated.

(*b*) Against RUNDSTEDT, in connection with the "Commando" Order, under which parachutists who were taken prisoner not in connection with battle actions were to be transferred to the Gestapo by whom they were, in fact, killed.

(*c*) Against all four generals, for responsibility for murder and ill-treatment of allied prisoners of war, chiefly Russians.

(*d*) Against BRAUCHITSCH, RUNDSTEDT and MANSTEIN, for certain breaches of the Geneva Convention arising out of the use of prisoners of war, chiefly Russians, on prohibited and dangerous work.

(*e*) Against all four generals, for responsibility for many crimes against civilians, including the illegal execution of hostages, excessive reprisals, extermination of Slavs, Jews and Communists and deportation into slave labour of civilians from all the occupied territories.

4. The vast majority of the victims were Russians. In point of numbers the Poles, doubtless, come second and Belgian, French, British and American victims were also involved, but in much smaller numbers. Our own direct interest is limited to the responsibility of RUNDSTEDT for the passing on of the "Commando" Order in so far as our own Special Air Service troops were killed, pursuant to it. Many of the actual perpetrators of these killings have already been tried before British Military Courts. The memorandum indicated evidence that RUNDSTEDT published a "Commando" Order dated 21st July, 1942 which, therefore, preceded Hitler's "Commando" Order of 18th October, 1942, but evidence is not included of what killings actually took place under the first Order.

5. Cases had been registered with the United Nations War Crimes Commission by Poland and by the U.S.A. against BRAUCHITSCH, RUNDSTEDT, and MANSTEIN, and by Belgium against BRAUCHITSCH. In addition Poland had specifically asked for the

handing over of MANSTEIN and BRAUCHITSCH, and the U.S.S.R. have asked for RUNDSTEDT and MANSTEIN. The trial of war criminals before British Military Courts is of course my responsibility, but the question of handing them over to other Powers is one in which the Secretary of State for Foreign Affairs is very much interested.

6. Examination of the memorandum made it clear that a vast amount of detailed preparation and investigation of documents would be necessary before any of the generals could be brought to trial. British translations of the documents summarised in the memorandum have not been provided: the originals are in American custody, many in U.S.A. Evidence will be required not only to bring home to the generals responsibility for the issue of the orders referred to in the memorandum, but to establish the actual results of the issue of these orders. It should also be noted that the jurisdiction of a British Military Court is limited to war crimes; it is not competent to try crimes against humanity or crimes against peace.

7. Since October, 1947, this question has been the subject of correspondence and discussions between myself, the Foreign Secretary, the Lord Chancellor and the Law Officers. Trial by a four-power court or an Anglo-American court was considered impracticable, and an approach was therefore made to the Americans to see if they would be prepared to include these generals along with von LEEB and other military leaders whose trials they then had in hand, but their cases were too far advanced and they were unable to comply.

8. There can be no doubt, I think, that if we are to undertake these trials it will be necessary to set up a special executive of picked people with specialist knowledge of the work of collecting evidence. There may be difficulty in obtaining the right people, and the further investigations necessary will take at least four months. It is very doubtful whether we shall get much help from Poland and Russia, who are chiefly affected, in providing essential evidence. For the actual trials we shall have to engage first-class Counsel. Separate trials may be necessary. It will obviously be quite impossible to complete by the target date (1st September next) which the Overseas Reconstruction Committee have set for completion of outstanding war crimes trials of people in our hands awaiting trial.

9. Before embarking on these further investigations, in view of the ages (RUNDSTEDT, 73, STRAUSS 69, BRAUCHITSCH, 67, MANSTEIN 61), and recent history of some of these generals, I thought it a wise precaution to have them medically examined, particularly as to their fitness to stand trial. They have been examined by an Army Medical Board and subsequently by a Home Office Board of two experienced prison medical officers. Both Boards agree that in the case of BRAUCHITSCH, who has had acute attacks of coronary thrombosis, the stress and strain of a prolonged trial would be likely to precipitate a further attack, which might well prove fatal. They agree that the other three are fit to stand trial, but think that if the trials appear likely to be prolonged beyond (say) a six months period of preparation followed by two month's trial, a further examination would be advisable in the cases of RUNDSTEDT and STRAUSS. RUNDSTEDT has arterio-sclerosis and other signs of senility, and suffers from mild depression and is potentially suicidal. STRAUSS has angina pectoris and high blood pressure and there is a risk, likely to be increased by prolonged stress and strain, of apoplexy or coronary thrombosis.

MANSTEIN'S sight is affected through cataract, but otherwise he appears healthy.

10. In view of the medical report on BRAUCHITSCH, who is obviously a very sick man, I do not think we should attempt to bring him to trial. In the case of the other three, there are arguments of force on both sides. On the one hand it may be felt that we have a duty to try the officers, in accordance with the principles enunciated at Nuremberg, if the evidence warrants it, that we ought not to let senior officers who incited the commission of war crimes go unscathed when many subordinates who actually carried out such crimes have been tried and sentenced, and that public opinion at home and abroad may be critical of our letting them go free. On the other hand there is the time, expense and man-power involved in staging these further trials of senior officers who have already been in our hands nearly three years, at a time when many people hoped that such trials were finished, our own relatively small direct interest, the difficulties involved in preparation of the cases and uncertainty whether essential evidence will be forthcoming, particularly from our eastern wartime Allies, the possibility that RUNSTEDT or STRAUSS may collapse or commit suicide before or during their trials, the ages of the three generals and unlikelihood that the death sentence will be inflicted if passed and the fact that they can still be detained in custody or kept under control if a danger to security. It may be mentioned that we have already tried eleven German generals before British Military Courts. Four were sentenced to death, but none, in fact, executed.

On balance, my own view is that it is not worth while, at this date, undertaking the heavy task of attempting to bring these three generals to trial.

11. In the meantime, we have had a request from the United States Executive in Nuremberg for medical certificates indicating the state of health of RUNDSTEDT, MANSTEIN and BRAUCHITSCH who have been asked for as defence witnesses in the High Command case now pending there. It is anticipated that Defence Counsel will produce affidavits from them and represent that they are too sick to travel, but the U.S. authorities think it most desirable that they should be available for cross-examination in open court if possible. It is believed that their presence would be required in the very near future. In view of our medical reports and the recent visit of RUNSTEDT to Germany, I think it can be assumed that RUNSTEDT and MANSTEIN would be fit, but not BRAUCHITSCH.

12. If it should be decided that the four generals are not to be tried by a British Court and are not to be handed over to any other power for trial, their ultimate disposal must be considered. The Foreign Office think that after their return to the British Zone of Germany, it is likely that renewed applications will be made for their extradition either to Poland or to the Union of Soviet Socialist Republics. The Military Governor of the British Zone of Germany, in accordance with the second conclusion of the meeting of the Overseas Reconstruction Committee of 12th April, has recently decided and announced in Berlin that all applications from foreign powers for the extradition of persons alleged to have committed crimes against peace, war crimes or crimes against humanity, should be presented on or before 1st September, 1948; any application for extradition made or presented after that date will be sanctioned only in the case of a person against whom a clear *prima facie* case of murder, as defined in the German Penal Code, is made out and not otherwise. The Foreign Office therefore suggest that if the four generals are not to be handed over, they should not be returned to the British Zone of Germany until after 1st September, and that as they are at present in hospital it would not be unreasonable to retain them there until after that date although their normal date for return would be not later than 12th July. On their return to the British Zone of Germany, BRAUCHITSCH, MANSTEIN and STRAUSS would technically face denazification process but would in fact probably only be so examined if they applied for employment. If RUNDSTEDT chose to return to his home in the United States Zone he would face denazification process, whether or not he applied for employment.

It is true that the four generals are at present in hospital, but while BRAUCHITSCH and MANSTEIN are genuine hospital patients (MANSTEIN with his eye trouble), RUNDSTEDT and STRAUSS, though needing regular medical attention, are held in a hospital only because there is no convenient camp in which to hold them. The hospital in which they are held will not close on 12th July because the disposal of Ukrainian hospital cases held there has not yet been decided. When the Ukrainians cease to be held, some special arrangements would have to be made according to the conditions then prevailing.

I would also point out that Poland applied to the War Office for the hand over of BRAUCHITSCH and MANSTEIN on 1st December, 1947, while they were in custody in this country, and the Union of Soviet Socialist Republics applied to the Military Governor for the hand over of RUNDSTEDT and MANSTEIN on 11th March, 1948, when they were in this country and not in the British Zone of Germany. The decision on the Russian request was therefore not one for the Military Governor to make, and I understand that he replied accordingly. It seems to me a little difficult in these circumstances to make a refusal to hand over hinge on the Military Governor's decision that applications for extradition must be made before 1st September, if we hold the generals in this country until after 1st September and then send them to the British Zone of Germany. I suggest that a refusal to hand them over, if decided upon, should be taken and maintained on the merits.

13. I invite my colleagues to decide:

(*a*) whether we should bring all or any of the four generals to trial;

(*b*) if not, whether we should hand over to other Powers those who have been asked for by them;

(*c*) how we should dispose of the generals if it is decided not to bring them to trial or to hand them over to any power;

(*d*) whether we should agree that the generals asked for by the Americans as witnesses in the pending trials at Nuremberg should be made available, if certified fit to travel.

THE WAR OFFICE, E.S.

17th June, 1948.

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22nd June, 1948

CABINET

WAR CRIMES: CASE OF GERMAN GENERALS IN BRITISH CUSTODY

MEMORANDUM BY THE ATTORNEY-GENERAL

I have seen the Secretary of State's Memorandum (C.P. (48) 151). I feel bound to express my concern at it and to bring the history of the matter to the notice of my colleagues. On the general position, I fully concur in the view expressed by the Foreign Secretary as set out in paragraph 13 hereunder. The trial of these Generals has been, as I think, inexcusably delayed for two years. In the course of that period one reason after another for abandoning the proposed trial has been put forward, only to be rejected by higher authority. I am not altogether surprised that the difficulties which have been caused by all this procrastination should now themselves be put forward as a ground for not proceeding with the matter. If, however, those difficulties are allowed to prevail there is no doubt that it will be said both by the Americans and at the Assembly of the United Nations that the Generals have escaped, while their underlings have been hanged, owing to the reluctance of British officers to allow highly placed members of the profession of arms to be submitted to such indignities, and owing to the fact that, for the most part, the victims were, after all, only Russians or Poles. Criticisms of this kind have already been made.

1. The Nuremberg Judgment delivered by Lord Justice Lawrence (as he then was) in October 1946 stated that there was "clear and convincing evidence" that many of the leading German Generals were not only guilty of planning and waging aggressive war, but also "of committing war crimes and crimes against humanity," and said that these men should be brought to trial so that they should not escape punishment.

2. The four high-ranking officers named, who were certainly amongst the leading and worst offenders in this field, were at that time in our custody. They ought to have been, and could have been, promptly brought to trial.

3. In August 1947 the United States Chief of Counsel wrote calling attention to the decision of the Nuremberg Tribunal, stating that they had unearthed a good deal of information further implicating the four officers, and expressing the opinion that action should be taken against them under Control Council Law No. 10 and the Judgment of the Nuremberg Tribunal. He enclosed a detailed memorandum setting out the case against the prisoners.

4. On 9th September, I wrote to the Foreign Secretary and the Secretary of State for War, informing them of the United States view.

5. On 3rd October, the Secretary of State for War wrote to the Foreign Secretary that a strong *prima facie* case was disclosed but suggesting that the trials should be conducted by the Americans or the Poles.

6. On 9th October (in my absence in New York), my Parliamentary Private Secretary, Major Elwyn Jones, who was one of the Nuremberg Counsel, represented my views to the Foreign Office. Apparently General Clay had at that

time indicated that he did not think the British were doing enough in regard to War Crimes, and the Americans were not likely to be prepared to take over the trials.

7. On 23rd October, General Telford Taylor again wrote to me, stating that his investigations had disclosed an ample and convincing case against certain officers in United States custody and asking what decision we had taken with regard to the four Generals. He added :—

> " Certain of the Defendants in the case we are preparing served under Brauchitsch, Manstein or Rundstedt, and in some cases orders which appear to have been the basis for some of the crimes committed by our Defendants were transmitted through Brauchitsch, Manstein and Rundstedt."

8. On 23rd October, the Commander-in-Chief, Germany, who had been instructed by the Foreign Secretary to approach the United States authorities with a view to their taking over the trial, telegraphed (to the surprise of the Foreign Office) that he " did not like " the idea of these men being tried, and had not approached General Clay.

9. On 29th October, General Taylor telegraphed :—

> " Ohlendorf in his testimony in his own defence here has heavily implicated Manstein in responsibility for mass slaughter of Jews by Einsatz Gruppen attached to Manstein's Army."

10. On 29th October, the Foreign Office were pressed for a decision which I might communicate to General Taylor.

11. On 3rd November, in view of developments at the United Nations Organisation General Assembly, I cabled from New York asking for a decision which could be communicated to the Americans.

12. On 12th November, General Taylor telephoned for information and could not be given any.

13. On 3rd December the Foreign Secretary stated that his Department agreed that the United States Memorandum proved the responsibility of the Generals for War Crimes and said that they should be tried by a British Military Court. He added :—

> " Whatever the difficulties of bringing these Generals to trial, it would clearly be wrong to let men who were responsible for issuing orders which led to the most atrocious crimes to go unpunished, while their subordinates . . . . pay the penalty, as many have already done."

14. On 19th December, a conference took place at the Foreign Office, at which the Secretary of State for War said :—

> " He was satisfied that the case was strong enough to merit trial. In spite of the fact that there was some pressure to cease trying any more war criminals so long after the end of hostilities he considered that the trials ought to take place."

The Lord Chancellor was invited to consider the case.

15. The Lord Chancellor immediately did so. He reported that there was a *prima facie* case and that prompt action was required to prepare the case. This the Foreign Secretary invited the Secretary of State for War to take.

16. On 23rd December, at the suggestion of the Foreign Office, I informed General Taylor that " it was likely " that we should decide to try the Generals.

17. On 26th January, 1948, the Judge Advocate-General's Department informed the Foreign Office that " the whole question was rather in the melting-pot " because of a medical report that the Generals were not fit to be tried. Apparently Army Medical Boards had been called in to examine them and had reported that none of them was fit to stand trial! I suggested that there should be an independent medical enquiry directed to the kind of consideration which would weigh with an English Court.

18. After some delay, a Board of Home Office doctors examined the Generals and reported on 25th March that three out of the four *were* fit to stand their trial.

19. The War Office then suggested that it would not be right to try only three out of the four. All should be tried or none. This argument had not previously been raised, as it might have been, to protect the underlings.

20. I have not myself been brought into, nor have I any knowledge of, what may have transpired since the Secretary of State for War, on 2nd April, suggested that all the men should be released. I should, however, not myself care to acquiesce in the suggestion that their release should be delayed and that they should be kept (in two cases quite unnecessarily) in hospital here until the last date on which we have undertaken to surrender war criminals to other Powers had passed, so as to protect them against the risk of extradition to those States in which their abominable crimes were committed. Nor, on the other hand, do I think it would be wise to state publicly that our decision not to prosecute was due to reasons of express and administrative difficulty, or, save in the case of Brauchitsch, honest to say it was owing to the ill-health of the prisoners. I have no desire to be vindictive: I am myself thoroughly sick of these war crime trials. But both nationally and internationally our good faith is very much involved. I suggest that (*a*) we ought to try the three men whom the Home Office doctors think fit for trial; (*b*) that we should also agree to those men being sent to Nuremberg if required by the Americans.

H. W. S.

Law Officers' Department,
22*nd June*, 1948.